

CALIFORNIA COASTAL COMMISSION

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November 9, 2000

TO: California Coastal Commissioners and Interested Persons

FROM: Peter M. Douglas Executive Director
Ralph Faust, Chief Counsel
Rebecca K. Roth, Federal Programs Manager

SUBJECT: California Coastal Management Program Workshop, Item 4, Wednesday
November 15, 2000

At the October 2000 Coastal Commission meeting, the Commission asked the Executive Director to conduct public workshops at the November and December 2000 meetings regarding the inclusion of certain categories of U. S. Fish and Wildlife Service (USFWS) incidental take permits to the California Coastal Management Program as a "listed" activity subject to federal consistency review. In order to augment the workshop presentations, the Executive Director's written report is intended to provide a context for adding the USFWS incidental take permits as a listed activity and provide information about the consistency review process as it relates to the federally-approved California Coastal Management Program (CCMP). Background material was distributed in advance of the staff report.

The Workshops and Commission Action

The November public workshop agenda is comprised of presentations from the Coastal Commission staff, the Director of the Office of Coast and Ocean Resources Management, staff from the USFWS and staff from the California Department of Fish and Game (see the agenda attached). In addition, the end of the workshop includes a public comment period. The second workshop will be held on December 11, 2000 in San Francisco.

The goals of both workshops are to educate the Commission about the CCMP and habitat conservation/multi-species plans and to provide an opportunity for the Commission to hear from members of the public. Specifically, the public workshops and hearings will provide explanation and discussion of the following:

- 1) federal consistency review process;
- 2) federal and state multi-species conservation planning programs; and,
- 3) the state effort to establish a coordinated process for Coastal Commission involvement and interaction with the Department of Fish and Game in the preparation, approval and implementation of Natural Community Conservation Plans that affect coastal resources.

Because this is a public workshop and hearing for the purposes described above, no action by the Commission is required on this item.

California Certified Coastal Management Program (CCMP)

The Coastal Zone Management Act of 1972 was enacted by Congress to encourage and assist the 35 coastal states and territories to develop and implement coastal zone programs to preserve, protect, develop and, where possible, restore and enhance the resources of the nation's coast. Delegated by the Secretary of Commerce, the National Oceanic and Atmospheric Administration's (NOAA) Office of Ocean and Coastal Resources Management (OCRM) is the agency that approves and oversees the state coastal zone management programs. In 1977, the CCMP was certified as meeting the standards of the federal Coastal Zone Management Act. The California program is administered by three state agencies: the California Coastal Commission; the San Francisco Bay Conservation and Development Commission and the State Coastal Conservancy. Pursuant to the Coastal Zone Management Act, a state with an approved coastal management program is eligible to receive federal funds and has the authority to assert federal consistency review.

Program Changes to the Federally-Approved CCMP

The Coastal Zone Management Act and federal regulations have provisions that allow states to modify or amend their approved coastal management program subject to the review and approval of OCRM. Under the requirements, changes to California's approved management program can be incorporated into the CCMP either as "amendments" or as "routine program changes." Pursuant to the federal Coastal Zone Management Act, the Coastal Commission's Executive Director requested that OCRM concur with the determination to include certain limited categories of USFWS "incidental take" permits in the CCMP as a "listed" activity for purposes of federal consistency review (letter to OCRM dated September 28, 2000). *This request would only affect the California Coastal Commission's list of federal permits and licenses and not the San Francisco Bay Conservation and Development Commission.*

The Coastal Commission proposes to add the following federal permit activity to the list:

Incidental take permits (ITPs) issued pursuant to section 10(a) of the federal Endangered Species Act of 1973 (ESA)(16 USC § 1539(a)(1)). This includes incidental take permits issued pursuant to the federal habitat conservation planning (HCP) program or any other multi-species or multi-agency habitat planning program.

The description of geographic areas outside the coastal zone where activities authorized by ITPs are likely to affect the coastal zone include the following: 1) federal land geographically within the coastal zone; 2) areas inland of the coastal zone that include habitat that is intended in any way to offset impacts to resources within the coastal zone; and, 3) areas outside the coastal zone that are contiguous or adjacent to the coastal zone boundary and that function as an integral part of an ecosystem that includes habitat within the coastal zone.

Staff notes that clarifying description of geographic areas was transmitted to OCRM on November 3, 2000. (see attached)

Federal Consistency Review of Federal Licenses and Permits

Pursuant to the federal consistency review process, the Coastal Commission is authorized to review the consistency of a variety of projects involving various levels of federal activity with the provisions of the CCMP (i.e., the Coastal Act). One example where the Coastal Commission reviews federal actions is the issuance of a federal license or permit that may have an affect on land or water uses in the coastal zone. Procedurally, there are two ways in which these federal permits and licenses are brought to the Commission's attention and reviewed by the Commission.

Listed Activity

The CCMP includes a "Federal License and Permit" list that identifies federal agency licenses and permits that are subject to the certification process for consistency with the management program. Currently there are sixteen permits and licenses that are included on this list ranging from the Army Corp of Engineer permits and licenses required under Section 404 of the Federal Water Pollution Control Act to the Bureau of Land Management permits for pipeline right-of-way on the Outer Continental Shelf. The most common review of a federal permit or license is for the Commission to receive notice from a federal agency of one of the permits or licenses that is contained on that list. As written in the approved 1977 CCMP in reference to the list of federal licenses and permits subject to federal consistency review, "This listing is intentionally limited to those Federal licenses and permits that may significantly affect coastal land and water resources."

Unlisted Activity

Where an activity is not contained on the list, the Coastal Commission may request to review the federal permit or license activity that is "reasonably expected to affect the coastal zone of the State" (15 CFR §930.54). The Coastal Commission is only informed of a permit or license that is "unlisted" and meets this definition by review of the federal register, members of the public bringing the matter to the staff's attention, or by speaking with other federal, state or local agency staff.

The review of an unlisted activity is labor and time intensive for the applicants, Coastal Commission staff, OCRM and the staff of the involved federal agency. The process to review an unlisted activity is broken down into the steps that are listed below.

- Where a permit or license meets the above cited test, (reasonably expected to affect the coastal zone), and the Coastal Commission elects to assert federal consistency review of the activity, notices must be provided to the Federal agencies and the applicants *within 30 days* from the notice of the permit application. [15 CFR §930.54(a)]
- In addition, the Coastal Commission is required to notify OCRM of the unlisted activity that the Commission believes should be subject to consistency review. [15 CFR §930.54(b)] It is at this stage the Commission requests OCRM's approval to review the activity.

- The Federal agency and applicant have *15 days* from receipt of the Coastal Commission's request to review the activity to provide comments to OCRM regarding the Commission's decision to review the activity. [15 CFR §930.54(c)]
- OCRM has *30 days* to render a decision regarding the Coastal Commission's request to review an unlisted federal activity. [15 CFR §930.54(c)]
- If OCRM decides that the federal permit or license activity can reasonably be expected to affect the coastal zone, the applicant is required to amend the application [15 CFR §930.54(e)].
- Following OCRM's approval to review an unlisted federal permit or license, the Coastal Commission has *three to six months* to either object or concur with the federal activity. [15 CFR §930.54(e)]

Why "List" a Federal Activity

Listing a federal license or permit allows for a more efficient review process of activities that the Coastal Commission believes can reasonably be expected to affect coastal zone resources. By listing an activity, such as the USFWS incidental take permits, notice would routinely be sent to the Commission as a matter of practice, which results in greater efficiencies, cost-savings, better public service, less likelihood that an activity will be "missed" and in a better environment for decision making.

As stated above, the CCMP contemplated that "the list" would not include all permits and licenses that could potentially affect coastal zone land and water resources. The CCMP also states that the list of permits was intentionally narrow in an effort to, "minimize the administrative burdens on the governmental entities." The CCMP states that "If it is found that the issuance of other federal permit and licenses causes significant effects on coastal land and water uses, the consistency requirement will be applied to those permits or licenses through administrative addition to the list above." The USFWS habitat conservation planning program that allows for the take of species (by issuing an incidental take permit) was approved by Congress in 1982 after the submittal and approval of the CCMP.

The Coastal Commission recently requested permission to review the incidental take permit that was proposed to be issued by the USFWS to the City of Carlsbad on July 26, 2000. OCRM approved the Coastal Commission's request to review under federal consistency the USFWS permit application would authorize the incidental take of species under the Endangered Species Act, the potential loss of habitat for the species, and mitigation activities in and outside the coastal zone for a period of 30 years. This incidental take permit came to the Commission's attention through staff's review of the federal register. Had the USFWS permit been listed, all parties would have been aware of the Coastal Commission's authority to review the incidental take permit earlier on in the process.

When the Coastal Commission is notified of a proposed incidental take permit, Commission staff evaluate the proposed "activity" and determines if the activity affects

coastal zone resources. If it does not (affect coastal zone resources), the staff can issue a negative determination and no further review is required. If it does (affect coastal zone resources), the matter is processed for consistency review with full public hearing by the Commission.

During the process of requesting review of the federal permit, the Coastal Commission learned of a number of Natural Community Conservation Plans (NCCP) and Habitat Conservation Plans that are either in the advanced planning stages or are near plan completion. Once these plans are complete and the applicants or local governments enter into an implementing agreement they apply for a USFWS incidental take permit. It is not clear how many of the incidental take permits that would be issued pursuant to an NCCP or Habitat Conservation Plan within the coastal counties could reasonably be expected to affect coastal zone resources.

It is clearly more efficient for the Coastal Commission to automatically receive notice of the permit than to conversely notice the federal agency, the applicants and OCRM to initiate the process of requesting to assert federal consistency review after the proposed permit is posted in the federal register.

Listing of USFWS Constitutes a Routine Program Change

Pursuant to the federal Coastal Zone Management Act, the Coastal Commission's Executive Director requested that OCRM concur with the determination that including certain limited categories of USFWS "incidental take" permits in the CCMP as a "listed" activity for purposes of federal consistency review constitutes a routine program change and not an amendment. The federal regulations define specifically the meaning for changes to a coastal management program that are considered either a routine program change or an amendment.

Adding certain limited categories of USFWS "incidental take" permits to the list of federal activities that the Coastal Commission receives notice of is a more efficient and effective way of implementing California's management program. Eight other coastal management programs have "USFWS permits issued pursuant to the Endanger Species Act" as permits that they review automatically as a listed activity under federal consistency. (The eight coastal management programs that have USFWS listed are New York, Connecticut, Louisiana, Mississippi, Oregon, Commonwealth of the Northern Mariana Islands, Guam, and Minnesota).

In consultation with OCRM, the Coastal Commission determined that the proposed addition to the list would not constitute an amendment. Pursuant to federal regulations [15 CFR 923.80(d)], program amendments are defined as *substantial changes in one or more of the following coastal management program areas:*

- (1) Uses subject to management;*
- (2) Special Management Areas;*
- (3) Boundaries;*
- (4) Authorities and organization; and*
- (5) Coordination, public involvement and national interest.*

Certain limited categories of USFWS "incidental take" permits can reasonably be excepted to affect coastal resources. The addition of these permits to the list of activities that the Coastal Commission automatically reviews meets the federal definition of a routine program change because it *further details the State's program and results in the implementation of provisions that were approved as part of a California's approved management program* (15 CFR 923.84). With respect to the Coastal Commission's review of the permits that allow for take of a species, OCRM approved the Coastal Commission's federal consistency review of the City of Carlsbad incidental take permit, stating that the Commission, "had adequately demonstrated that coastal affects are reasonably foreseeable."

Federal Consistency Authority

A discussion of the Commission's jurisdiction over these permits is contained in a separate memorandum to the Coastal Commissioners from Ralph Faust, Chief Legal Counsel and John Bowers, Staff Counsel dated November 9, 2000. The memo is attached to this report.

CCC Workshop #1 – California Coastal Management Program

Addition of U. S. Fish and Wildlife Services Incidental Take Permits to List of Federal Activities Subject to Federal Consistency Review

I. Federal Consistency Authority Pursuant to CZMA - CCC, Chief Counsel, **10 min**
Ralph Faust

Commissioner Questions **10 min**

II. California Coastal Management Program – CCC, Federal Programs Manager, **10 min**
Rebecca Roth

- a. Federal licenses and permits activities – listed versus unlisted
- b. Process to review unlisted
- c. Why list an activity and why is this permit necessary

Commissioner Questions **10 min**

III. Comments by Office of Ocean and Coastal Resources Management OCRM **15 min**
Jeff Benoit, Director

- a. National Perspective
- b. OCRM's Review Process for Requests to Change "the List" of Federal Activities Subject to Federal Consistency Review
- c. OCRM Standards for Determining State Program Routine Program Changes verses Amendment
- d. Coordinated state review process

Commissioner Questions **10 min**

IV. Habitat Conservation Plans

a. General overview HCP process: **15 min**
Standards/process of how decisions are made USFWS -
statutes and understanding of law; agreements entered into Mike Spear (invited)

b. General overview of Natural Community Conservation Plans – DFG, **15 min**
Standards/process of how decisions are made Deputy Director, Ron Rempel
statutes and understanding of law; agreements entered into

Commissioner Questions **20 min**

c. Current and future coordination w/ Department of Fish and Game - CCC, **20 min**
Chief Counsel, Ralph Faust

Commissioner Questions **10 min**

V. Coastal Act and Interaction with HCP Process - CCC, **20 min**
Executive Director, Peter Douglas

VI. Public Comment **(1 hr. 30 min)**

VII. Commission Discussion

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November 3, 2000

Jeff Benoit, Director
Office of Ocean and Coastal Resource Management
1305 East West Highway, 11th Floor
Silver Spring, MD 20910

Dear Mr. Benoit:

As you are aware, questions have arisen regarding the geographic scope of federal consistency review that would occur pursuant to the Coastal Commission's request to list the incidental take permits issued by the U.S. Fish and Wildlife Service. We believe it would benefit the public and interested agencies to clarify the language in #3 of the geographic description. Therefore, for purposes of clarification only, we request that the following language be considered by OCRM:

Department of the Interior - U.S. Fish and Wildlife Service:

Incidental take permits (ITPs) issued pursuant to section 10(a) of the federal Endangered Species Act of 1973 (ESA)(16 USC § 1539(a)(1)). This includes incidental take permits issued pursuant to the federal habitat conservation planning (HCP) program or any other multi-species or multi-agency habitat planning program.

The description of geographic areas outside the coastal zone where activities authorized by ITPs are likely to affect the coastal zone include the following: 1) federal land geographically within the coastal zone; 2) areas inland of the coastal zone that include habitat that is intended in any way to offset impacts to resources within the coastal zone; and, 3) areas outside the coastal zone that are contiguous or adjacent to the coastal zone boundary and that function as an integral part of an ecosystem that includes habitat within the coastal zone.

Please call me if you or your staff have any questions regarding this matter.

Sincerely,

Peter M. Douglas
Executive Director

cc: Commissioners
Mike Spear, U. S. Fish and Wildlife Service
Robert Hight, California Department of Fish and Game
Mary Nichols, Secretary Resources Agency
All Interested Parties

CALIFORNIA COASTAL COMMISSION

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**MEMORANDUM**

November 9, 2000

TO: Coastal Commissioners

FROM: Ralph Faust, Chief Counsel
John Bowers, Staff Counsel

RE: **Analysis of the Commission's Jurisdiction to Review Activities to be Authorized by Incidental Take Permits Granted under the Federal Endangered Species Act**

I. BACKGROUND.

Pursuant to section 10(a)(1)(B) of the Endangered Species Act (ESA) 16 USC § 1539(a)(1)(B)), the U.S. Fish and Wildlife Service (hereinafter, "the Service") may issue a permit that authorizes the "take" of species listed as endangered under the ESA as long as such a "take" is incidental to, and not the purpose of, an otherwise lawful activity. In the absence of a permit from the Service such a "take" of endangered species is prohibited by section 9(a)(1)(B) of the ESA. Such a permit is commonly referred to as an "incidental take permit" (ITP). In order to obtain an ITP an applicant must submit a habitat conservation plan that specifies, at a minimum, the likely impact of the take, the steps that will be taken to monitor, minimize and mitigate such impacts, including funding to implement such steps as well as procedures for dealing with unforeseen consequences, and the alternatives that were considered and rejected by the applicant, along with an explanation of why these alternatives are not being proposed.

The City of Carlsbad has applied to the Service for an ITP. Activities that require one or more federal licenses or permits, such as an ITP, and that affect coastal zone resources are subject to the consistency review requirements of the CZMA. Earlier this year, the Commission asserted jurisdiction pursuant to the Coastal Zone Management Act (CZMA) to review the City of Carlsbad ITP for consistency with the enforceable policies of the California Coastal Management Program (CCMP). By letter dated August 31, 2000, the National Oceanic and Atmospheric Administration (NOAA) concurred in the Commission's assertion of jurisdiction.



Subsequently, by a memorandum to the Commission and other interested parties dated September 28, 2000, the Executive Director of the Commission initiated the process under the CZMA regulations for amending the CCMP to add ITPs granted by the Service to the CCMP's list of federal licenses and permits. Activities that require one or more federal permits on this list are subject to the consistency review requirements of section 307(c)(3)(A) of the CZMA without the need for individual, case-by-case concurrence by the NOAA in the Commission's assertion of consistency jurisdiction.

At a recent Commission meeting questions were raised as to whether the Commission's actions in 1) asserting jurisdiction over the Carlsbad ITP, or 2) seeking to add ITPs granted by the Service to the CCMP's federal permit list, represent an "expansion" of the Commission's jurisdiction to conduct consistency reviews under the CZMA. The purpose of this memo is to provide a response, with supporting analysis, to these questions.

II. QUESTIONS PRESENTED.

- A. Does the Commission's assertion under the CZMA of jurisdiction to conduct a consistency review of the Carlsbad ITP represent an "expansion" of the Commission's CZMA jurisdiction?
- B. Does the Commission's undertaking to add ITPs granted by the Service to the CCMP's list of federal permits represent an "expansion" of the Commission's CZMA jurisdiction?

III. SUMMARY OF ANSWERS.

- A. No. Since the federal approval of the CCMP in 1978, the Commission has had the authority to review activities that require one or more federal licenses or permits and that affect coastal zone resources. Thus, the commission's assertion of jurisdiction to conduct a consistency review of the Carlsbad ITP does not represent an "expansion" of the Commission's consistency review jurisdiction under the CZMA, but rather represents an exercise of jurisdiction that the Commission has always possessed.
- B. No. The addition of ITPs granted by the Service to the CCMP's list of federal permits represents simply a more efficient alternative means (as compared to the case-by-case assertion of jurisdiction over individual ITPs as "unlisted" federal permits) of asserting consistency review jurisdiction that the Commission already possesses over the activities authorized by such ITPs, and thus does not represent an "expansion" of this jurisdiction.

IV. ANALYSIS.

- A.** The Commission asserted consistency review jurisdiction over the Carlsbad ITP pursuant to authority it possesses under Section 307(c)(3)(A) of the CZMA (16 USC § 1456(c)(3)(A)). Section 307(c)(3)(A) authorizes the Commission to conduct a consistency review of any activity that requires a “federal license or permit” and that affects any “land or water use or natural resource of [California’s] coastal zone....”

Section 930.51(a) of the CZMA regulations (CFR, Title 15, Part 930) defines the term “federal license or permit” for purposes of section 307(c)(3)(a) to mean “any authorization, certification, approval, or other form of permission which any Federal agency is empowered to issue to an applicant.” ITPs clearly fall within the scope of this definition, both now as well as at all times since 1982 when Congress amended section 10 of the ESA to authorize the Service to grant them.

- B.** In concurring in the Commission’s assertion of jurisdiction over the Carlsbad ITP, the NOAA found that “the City’s activity can reasonably be expected to affect coastal resources of California’s coastal zone....” Necessarily, this finding arose out of the specific factual circumstances of the Carlsbad ITP. However, NOAA’s finding provides strong inferential support for the view that the Commission would receive a similar concurrence in an assertion of jurisdiction over *any* ITP that, like the Carlsbad ITP, affects land located within the coastal zone, if the Commission elects to make such an assertion.
- C.** As noted above in paragraph “A,” Section 307(c)(3)(A) of the CZMA empowers the Commission to conduct a consistency review of any activity that requires a “federal license or permit” and that affects “any land or water use or natural resource of [California’s] coastal zone....” Sections 923.53(a)(2) and 930.53(b) of the CZMA regulations require the Commission to include in the CCMP a list of federal permits that satisfy this statutory standard and that the Commission wishes to review for consistency with the CCMP. Any activity that requires a permit that is listed in the CCMP is automatically subject to the Commission’s consistency review authority. (15 CFR § 930.53(e).) However, the Commission may also exercise the authority that it possesses pursuant to section 307(c)(3)(A) over activities that require federal permits that are *not* listed in the CCMP. It may do so by requesting and obtaining from the NOAA that agency’s concurrence in the Commission’s intent to exercise such authority. (15 CFR § 930.54.) The Commission followed this procedure in asserting its consistency review jurisdiction over the City of Carlsbad ITP. Therefore, it is the coastal zone “effect” test of section 307(c)(3)(A), not whether a permit is listed in the CCMP, that determines whether the Commission possesses jurisdiction to conduct a consistency review of activities that require such a permit. Whether or not a permit is “listed” in the CCMP is relevant only to the procedure that the Commission must follow in asserting its consistency review authority.

- D.** For these reasons, it is clear that the Commission's assertion of jurisdiction over the City of Carlsbad ITP does not represent an "expansion" of the Commission's consistency review jurisdiction under the CZMA. Rather, it represents an assertion of jurisdiction under section 307(c)(3)(A) of the CZMA that the Commission has always possessed.

Similarly, adding ITPs granted by the Service to the CCMP's list of federal permits does not represent an "expansion" of the Commission's consistency review jurisdiction. Rather, it represents a more efficient alternative means, in terms both of government resources and of early notice to interested parties, by which the Commission can assert such jurisdiction.